Regional Construction Corporation *and* Laborers' Local Union No. 472, a/w Laborers' International Union of North America, AFL–CIO. Case 22–CA–21968

February 14, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND WALSH

On April 23, 1998, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs, and the Respondent and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

William E. Milks, Esq. and *Jeffrey P. Gardner, Esq*., for the General Counsel.

Gerald L. Dorf, Esq. and *Leslie P. Katenbach, Esq*., for the Respondent.

[1] The judge found that the complaint is not barred by Sec. 10(b) of the Act, citing *Embassy Suites Resort*, 309 NLRB 1313 (1992). In that case, the Board found that specific complaint allegations could be supported by boilerplate language typed into the charge by a charging party. The judge also noted that the D.C. Circuit Court of Appeals disagreed with the Board. *Embassy Suites Resort v. NLRB*, 32 F.3d 588 (1994). We find *Embassy Suites Resort* distinguishable. This case involves more than boilerplate language. Rather, the charge referred to the April 2, 1997 date on which the Respondent filed its motion for an amended order in state court. Accordingly, the Charging Party supplied specificity as to the action which it was alleging to be unlawful. Moreover, the Respondent's May 15, 1997 letter to the Board, in response to the Charging Party's charge, reveals that the Respondent knew precisely what the Charging Party had alleged in its charge. The Respondent provided a history of the picketing dispute between it and the Charging Party and noted that the Charging Party was contending that the Respondent's motion for an amended order curtailed the Charging Party's right to picket. Accordingly, the charge, as framed and understood, apprised the Region and Respondent of the conduct being alleged as unlawful.

[2] The judge found that the Respondent's April 2 motion in the State court proceeding did not violate the Act. We agree for the reasons cited by the judge. However, we find it unnecessary to pass on the judge's extended discussion, in fn. 7 of his decision, of *Loehmann's Plaza*, 305 NLRB 663 (1991).

The General Counsel does not allege that the Respondent's motion became unlawful on June 27, the date on which the court dismissed the entire lawsuit.

James R. Zazzalli and *Edward H. O'Hare, Esq*., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Newark, New Jersey, on January 26, 1998. The charge in this case was filed by the Union on April 8 and the first amended charge was filed on October 15, 1997. The complaint was issued on June 25, 1997, and amended at the hearing. The issue here is a variant of the kind of issue described in *Bill Johnson's Restaurant v. NLRB* 461 U.S. 731 (1983).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent (Regional), is a New York based contractor in the construction industry. Annually, it performs services valued in excess of $50,000 in States other than the State in which it is located. I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.[1] I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Regional is a general contractor in the construction industry. In the present case it was engaged in the construction of a 350,000-square-foot shopping center located in Pohatcong, New Jersey. The site in question is located at the intersection of Routes 22 and 519.

Local 472 began picketing at the construction site in December 1996. Regional alleges that the Union engaged in conduct which blocked ingress and egress to construction site entrances and exits and also engaged in other tortious conduct at the site. On December 9, 1996, Regional filed a complaint against the Union in Superior Court of New Jersey.

On December 13, 1996, Judge Wilfred P. Diana issued a Decision and Order stating inter alia;

> 1. That the Union blocked ingress and egress to property thereby causing a public nuisance on Routes 22 and 519; and
>
> 2. That the Union engaged in mass picketing.
>
> 3. That the foregoing actions by the Union prevented plaintiffs from their right to ingress and egress and their ability to perform construction and related activities in accordance with their contractual commitments.

Based on the these findings the court issued the following order:

[1] In its brief, the Respondent contends that because the instant matter arose in the context of the Company performing road improvement work required by the State of New Jersey, it should be considered an instrumentality of a governmental agency and therefore not an employer within the meaning of the Act. This argument has no merit and is rejected. *Management Training Corp.,* 317 NLRB 1355 (1995).

1. Defendants may picket at the Pohatcong Plaza construction site which is located at the intersection of County Route 519 and State Highway 22, Township of Pohatcong, Warren County, New Jersey, only if they comply with the limitations and provisions of this Order;

2. The Plaintiffs shall maintain five entrances and exit gateways to the property, as marked on the attached maps. The Plaintiff shall instruct its employees, material suppliers, delivery persons, and subcontractors that they shall only utilize these gates. The Plaintiff, its employees, material suppliers, and delivery persons shall not use any entrance or exit gate which abuts the residential area to the south of the property;

3. Defendant Local 472 shall be permitted a maximum of six pickets at each gateway. The pickets shall be directed to walk at a reasonable speed and at a reasonable distance, and shall not block ingress and egress to the aforementioned construction site. Pickets shall yield to all traffic approaching and departing the construction site, and shall readily form a pathway of appropriate size through the picket line in order to permit such traffic to pass freely and unhindered through the picket line;

(a) Pickets shall be prohibited from blocking the free flow of traffic on Route 22 and Route 519;

(b) The pickets shall not affix any sign to Plaintiff's property or place any object on Plaintiff's property, including but not limited to an inflatable rat;

4. The Parties shall direct their members or employees and all other persons or entities acting in concert, combination or participation with them or on their behalf to obey this Order;

5. The Township of Pohatcong Police Department, the Sheriff of Warren County, the New Jersey State Police and any other local police department or law enforcement agency having jurisdiction over the parties shall enforce this Order without further order from this court;

6. Defendant Local 472 has, on the record, waived its right to any hearing on the issuance of a preliminary injunction; and

7. The complaint in this case is dismissed as against Local 825.

Thereafter, on December 19, 1996, the Union filed an application with the court seeking to hold Regional in contempt of the Order apparently based on its assertion that Regional was utilizing a gate at the site that was reserved for another employer. It seems that a hearing on this contention was held on December 20, 1996, and the Union's application was denied.

On January 22, 1997, the court issued a supplemental order. This was the result of negotiations between counsel for the Union and the Employer and was on consent. The order states inter alia:

1. The pickets shall conduct themselves in a peaceful, orderly and non-violent manner at all times.

2. The pickets shall not throw objects at vehicles or individuals, including but not limited to bottles, rocks, or ball bearings.

3. The pickets shall not throw or place objects at or around the construction site including by not limited to metal prongs.

4. The pickets shall not bring any weapons to the construction site. The pickets shall not discharge or utilize any weapons at the construction site.

5. The pickets shall not use obscene or vituperative language on the picket line.

6. The parties shall direct their members or employees and all other persons or entitles acting in concert, combination or participation with them or on their behalf to obey this Supplement Order.

With respect to the above, it is noted that the General Counsel does not contend that the Respondent violated the Act by filing and pursing the lawsuit described above which, *on the allegations contained therein*, was not preempted by the National Labor Relations Act. *Automobile Workers v. Russell*, 356 U.S. 634 (1958); and *Youngdahl v. Rainfair*, 355 U.S. 131 (1957). Nor does he allege that there was anything improper or inappropriate in the orders that were entered by Judge Diana which were within the jurisdiction of that court under the State's police powers. I also note that the orders issued by Judge Diana were entered without there having been a full hearing on the underlying facts and I make no findings or conclusions with respect to any allegations or counterallegations made by each party in the underlying case.

In negotiating the original and supplemental orders, it is obvious that counsel for the Union and the Employer, were cognizant of the Board's reserve gate doctrine and its application to construction sites. See for example *Building & Construction Trades Council (Markwell & Hartz,)* 155 NLRB 319 (1965), enfd. 387 F.2d 79 (5th Cir. 1967). Thus, the orders not only dealt with the questions of alleged violence and blockages, but also set up a system of reserved gates which sought to accommodate the Union's right to picket at or near the primary employer with whom it had a dispute and refrain from picketing at gates reserved for secondary employers. Therefore, the negotiated orders looked beyond the immediate alleged facts and sought to regulate the Union's conduct so that it would be in conformance with the provisions of Section 8(b)(4)(B) of the National Labor Relations Act which defines and precludes secondary boycotts. In this sense, the parties went beyond the scope of the existing case and entered a prophylactic order to address a problem which was not really before the court. Pursuant to these orders, the Employer set up five entrances to the construction site and the parties agreed as to which the Union would be picket and at which there would be no picketing.

This is where the matter stood until April 2, 1997, when Regional filed a motion with the court to amend the foregoing orders.

Commencing in April 1997, Regional was required to begin to make certain road improvements to Routes 22 and 519. These road repairs apparently were a condition of obtaining permission to build the shopping center. Among other things, the work involved widening the roads and berms. In any event, this was work that was to be done off the construction site and was to be done in stages over a limited period of time. As the

road work was going to require, at least temporarily, the closing of some of the existing construction site entrances, and the making of new entrances, Regional's counsel thought it prudent to go back to the court to get an amended order so that it would not be accused of invalidating the reserve gate system that had been set up by the prior orders.

In early March 1997, Regional's attorney, Gerald L. Dorf, sent a letter to Union Counsel James R. Zazzalli, which informed him of the upcoming plans for road repair and notified union counsel of Regional's intention to seek a modification of the previous court orders. Counsel enclosed a copy of a proposed order for review and comment.

By letter dated March 10, 1997, union counsel responded and set forth his opinion and objections to various provisions of the proposed amended order. Among other things, Zazzalli stated;

> I understand that the employer wishes to close the present gates, as they may be temporarily dormant and/or obsolete, and that it intends to install new gates . However, if any other gates are to be established, or, as I gather from your proposal, perhaps closed and re-established, Local 472 has the right to picket those locations. As currently drafted, the Amended Order appears to impermissibly restrict or entirely prohibit appropriate picketing. At the same time, it gives the employer carte blanche to enter and exit from any location on the property.
>
> Moreover, the Amended Order provides no mechanism for notice to Local 472 of changes in gate location and use. As drafted, the Union and employer would be engaged in a continual game of musical chairs—but only the employer would know when the music would start or stop. Obviously, we cannot agree to that, and I strongly doubt the Court would enter such an Order.
>
> That said I believe this can be worked out. In response to each paragraph of the proposed Amended Order I have set forth the following comments and/or proposals.
>
> . . . .
>
> I look forward to working this out with you—and I believe that we will. Indeed to date, I think that we have been able to resolve these issues satisfactorily.
>
> But I must be clear. the above comments and proposals seek to underscore one essential premise: if a location is being utilized for ingress or egress to the property, Local 472 has the right to picket that site. In that regard, I simply will not agree to any provision that extinguishes—or even diminishes—that fundamental right.
>
> Gerry, while we have joked about this, I am serious when I say that we are willing to try to resolve this, but only as a courtesy to you. Under other circumstances, and with most other attorneys, I would simply let the Court decide it because, in these circumstances, the type of Order you seek will not be granted. We will accommodate you. But we will not agree to conditions a court would not require.

On March 17, Regional's attorney responded with a redrafted proposed amended order and indicated that he would be available to discuss any objections or counter-proposals made by the Union. This letter stated inter alia;

> The Amended Order has been re-drafted to address the concerns of Local 472 to the extent that they were reasonable. Paragraphs 1, 2, 4 and 7 now indicate that picketing is prohibited during the time of any temporary closure of the gates. Those paragraphs also require Plaintiffs to provide Local 472 with 24 hour advance notice of any closure or re-opening of gates.
>
> I also considered the proposed language which would require plaintiffs to instruct" employees, material suppliers, delivery persons and subcontractors that the closed gates should no longer be used, I did not incorporate that language into the Amended Order because Plaintiffs cannot guarantee that every such party, particularly those who may be outside their direct control, will receive an instruction regarding the non-use of the gates.
>
> Finally, I added language to paragraph 8 which further defines and limits the off-site work which is the subject of that paragraph.
>
> Jim I believe that the Amended Order recognizes the rights of the plaintiffs as well as Local 472. It enables Plaintiffs to proceed with the construction project and, at the same time, gives Local 472 advance notice regarding the opening and closure of gates so that it can continue picketing activities.
>
> I will be in the office on Wednesday after 9:30 a.m. Please telephone me after you have reviewed this letter and the revised Amended Order so we can conclude this matter.

Apparently, no agreement was reached and on April 2, 1997, Regional filed a motion for an amended order. The proposed order, at paragraph 8, contained the following language which is what the General Counsel contends is sufficiently offensive so as to make the mere seeking of this remedy a violation of Section 8(a)(1) of the Act.[2]

> When necessary to perform off-site work including but not limited to utility and sewer installations, improvements and connections; roadway and curbing construction and improvements; traffic signals; and landscaping, Plaintiffs and their contractors, subcontractors, suppliers and agents may utilize entry and exit locations other than the gates which have been established by the Order dated December 13, 1996, the Supplemental Order dated January 22, 1997, and this Amended Order, Picketing shall not take place at such entry and exit locations.

In part, the General Counsel's theory is that this single aspect of the proposed amended order would modify the existing reserve gate arrangements to the extent that the Union would not be entitled to engage in lawful primary picketing at certain entrances despite the plaintiff's use of those entrances.

[2] To the extent that the Union contends that the Respondent violated the Act by any other action, such a contention is precluded as it is the General Counsel who determines what if any conduct is a violation of the Act. *Kaumagraph Corp*., 313 NLRB 82 (1994).

The Union made an unsuccessful attempt to remove the matter to the Federal District Court but the matter was remanded to the state court. The motion for an amended order which had been filed on April 2, was argued before Judge Diana who issued a decision dismissing the motion on June 27, 1997. That was 2 days after the instant complaint was issued. In showing an understanding of the labor law issues, Judge Diana held that inasmuch as the Employer was not alleging any additional actions such as violence or blockages which would be within state court jurisdiction, the additional remedies sought by the company were preempted by the National Labor Relations Act, as the remedy sought concerned rights and obligations defined and regulated by the NLRA. The judge also concluded that in the absence of any new acts proscribed by state law, the original orders expired after 6 months under New Jersey's Anti-Injunction Act. In short, Judge Diana concluded that the motion to amend the original orders had no merit. He also noted that as of June 17, 1997, the Union had certified that the picketing had been withdrawn and that it had no plans to resume picketing in the immediate future. (I am taking official notice of Judge Diana's decision.)

III. ANALYSIS

A. The 10(b) Issue

As noted above, the original charge, filed by the Union on April 8, 1997, simply used boilerplate language to allege that Regional violated Section 8(a)(1) of the Act. A complaint was issued based on this charge on June 25, 1997. Thereafter, an amended charge was filed on October 15, 1997, which set forth the facts which the Union alleged to be violative of the Act. This amended charge was filed more than 6 months after the alleged event occurred; to wit, the filing by the Employer, on April 2, 1997, of its motion to amend the order in the lawsuit it had previously filed. At the opening of the hearing, the General Counsel moved to amend the complaint to reflect that fact that an amended charge was filed.

In *NLRB v. Fant Milling Co*., 360 U.S. 301, 309 (l959), the court held that allegations in a complaint which are not specifically alleged in the charge are proper if the matters asserted in the complaint "are related to those alleged in the charge and grow out of them while the proceeding is pending before the Board." The requirement that a complaint allegation have some relationship to the allegations of the unfair labor practice charge is that the statute prohibits the Board from initiating complaints on its own.

In *Embassy Suites Resort,* 309 NLRB 1313 (1992), a charge stated, in substance, that the Employer within the last 6 months had discriminated against employees and had interfered with, restrained, and coerced employees in the exercise of their Section 7 rights. A complaint was issued and alleged that the Respondent violated Section 8(a)(1) by (1) implying that the Union was preventing it from granting a wage increase; (2) creating an impression of surveillance; (3) threatening to reduce employee amenities if the Union won an election; and (4) impliedly promised a wage increase if the Union lost the election. The Board, with Member Stephens dissenting rejected the Respondent's argument that the complaint was barred by Section 10(b) and held that the charge, which was timely filed, was sufficient to support the allegations of the complaint. The court in *Embassy Suites Resort v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994), reversed the Board and relying on *Fant Milling* and *G. W. Galloway Co. v. NLRB*, stated inter alia,

> The Board was without authority to initiate an investigation and issue a complaint in this case based upon an unfair labor practice charge containing only a boilerplate allegation that the Employer violated Section 8(a)(1) and utterly lacking in factual specificity. Our decision should not be thought to derogate from the Board's authority to "include allegations in the complaint that are not specifically asserted in the charge." . . . To allow the Board to issue a complaint based upon a charge containing only a boilerplate Section 8(a)(1) allegation, however, unbounded by any specific facts, is "tantamount to allowing the Board to enlarge its jurisdiction beyond that given it by Congress."

Under the D.C. Circuit's view of the law, the charge in this case, although timely filed, did not state any facts and therefore was not a valid charge upon which a complaint could have been issued. The attempt to amend the charge by alleging specific facts took place more than 6 months after the alleged actions occurred. Accordingly, the amendment would be outside the 10(b) period and therefore could not cure the original invalid charge. The consequence would be that the complaint, as either initially issued or as amended at the opening of the trial, is one that is based on an invalid charge and would be barred under the Act's statute of limitations

The court's view is, however, not the Board's view and I am bound to follow Board law until such time as the Board's members change their minds or the Supreme Court tells them to change their minds. Accordingly, based on the facts in this case, I conclude that the charge was timely filed and was amended so as to meet the Act's 10(b) requirements.

B. The Bill Johnson Issue

The complaint alleges that the Respondent by pursuing a lawsuit in state court in a particular way, has violated Section 8(a)(1) of the National Labor Relations Act. This is the kind of issue that raises difficult questions regarding the relationship between agencies of the Federal Government and the rights of citizens to pursue legal claims in state courts.

In the present case, the Employer filed a lawsuit in a New Jersey court seeking to enjoin the Union from engaging in alleged threats, violence and entrance blockages. Such a lawsuit is clearly within the permissible jurisdiction of the state courts and is not preempted by the National Labor Relations Act notwithstanding that such conduct may also constitute violations of Section 8(b)(1)(A) of the Act. Where these type of allegations are made, the Board and the courts have concurrent jurisdiction. *Construction Workers v. Laburnum Construction Corp*., 347 U.S. 656 (1994).

There was no full evidentiary hearing in the state lawsuit and the lawyers for the company and the Union negotiated and agreed to the entry of a consent order. This order was thereafter further modified by the consent of the parties. The General

Counsel does not contend, nor could he, that the original lawsuit was baseless or motivated by retaliatory considerations.

Nevertheless, in negotiating the consent orders, the attorneys set out a remedy that went beyond what the New Jersey court might have issued if the plaintiff therein had been successful. Thus, in addition to enjoining violence and blockages, the parties agreed to set up a group of entrances to the construction site and to reserve some for the exclusive use of the primary employer while reserving the remainder for secondary persons. In essence, what the parties did by mutual consent was to attempt to resolve a problem that was not before the New Jersey court. What they did was to resolve, ahead of time, secondary boycott issues which are matters within the exclusive jurisdiction of the National Labor Relations Act, at least insofar as the availability of injunctive relief.[3] In so doing, the attorneys obviously were familiar with NLRB and court cases dealing with picketing at construction sites where numerous employers are situated and where reserve gates have been established. See for example *Building & Construction Trades Council (Markwell & Hartz,)*, 155 NLRB 319, enfd. 387 F.2d 79 (5th Cir., 1967), cert. denied 391 US 914 (1968). I do not know whether Judge Diana was equally familiar with this aspect of the law, but I do not see why he would have declined to put his imprimatur to an order which had been negotiated between two knowledgeable labor attorneys.

What brought the Employer back to the New Jersey Court was a change of circumstances wherein work involving the public roads necessitated changes in the gates that had been reserved pursuant to the initial consent orders. In that sense, the Employer was trying to modify the original consent orders so that it would not be accused of violating the reserved gates thereby enabling the Union to ignore the gates and picket at all entrances. In so doing, the Respondent's attorney was careful to notify the Union's attorney of his intentions and to submit for review and comment, the amended order before he submitted it to the court. The Union's attorney expressed consent to some aspects of the proposed order, rejected others (particularly par. 8), and suggested that he thought the parties could negotiate the matter. Respondent's counsel made some modifications and indicated his willingness to talk further. However, in the absence of agreement, Respondent's counsel filed, on April 2, 1997, a motion to amend the previous orders which contained the language of paragraph 8 which the General Counsel contends is so offensive as to warrant a finding that the Respondent committed a violation of the Act. .

[3] Sec. 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act prohibits a labor organization from engaging in secondary boycotts and Sec. 10(l) of the Act gives the Board the exclusive authority to seek temporary injunctions in the Federal District Courts against a union where the Regional Director has reasonable cause to believe that such a violation has occurred. In the event of a violation of the secondary boycott provisions of the Act, the Board is empowered to issue a cease and desist order which, if enforced by a circuit court, is tantamount to a permanent injunction. While a private party is preempted from suing to obtain injunctive relief for secondary boycotts against unions in labor disputes, Sec. 303 of the Act does permit a private party to sue for damages.

I should note at the outset that I do not find that the motion to amend was filed with any retaliatory intent. It seems to me that it was filed with the intention of meeting the exigencies of changed circumstances, and if the proposed amended order seemed to be asking for too much, there is no doubt in my mind that it was not filed in bad faith. I also note that the motion *did not seek to prevent all primary picketing* at the construction site. All it purports to do is to modify the reserved gates and to permit, in limited and temporary circumstances, the Respondent to use gates that otherwise would be reserved for others, without being picketed at such gates. While such a result, if granted by the State court, might have been inconsistent with the Board's view of secondary boycotts in the context of common situs picketing where there are reserved gates, and probably would not be enforceable under the preemption doctrine, it is hard for me to say that such a result would be illegal. Moreover, while it may be said that the motion was ultimately found by Judge Diana to be baseless (resulting in its dismissal) the evidence does not show that the motion was motivated by retaliatory intent.

In *Bill Johnson's Restaurant v. NLRB,* 461 U.S. 731 (1983), a waitress, who believing that she had been fired because of her efforts to organize a union, engaged in picketing and leafleting along with three other employees. The employer's manager confronted the pickets and vowed to "get even" with them "if its the last thing I do." Subsequently, the restaurant filed in state court, a complaint against the four employees and alleged that they had engaged in mass picketing, had harassed customers, blocked entrances and that the leaflets contained false and defamatory statements. While the lawsuit was still pending, the General Counsel issued a complaint alleging that the employer violated Section 8(a)(1) of the Act by filing and pursing the State court lawsuit. The administrative law judge concluded, based on *Power Systems*, 239 NLRB 445, 449–450 (1978), that the employer committed an unfair labor practice by instituting a civil lawsuit for the purpose of penalizing or discouraging its employees from filing charges with the Board or seeking access to the Board's processes. Before reaching this conclusion, the administrative law judge held a 4-day hearing where the parties, in effect, fully litigated the State court claims. As to the libel claim, the administrative law judge found that it was baseless because "the evidence establishe[d] the truthfulness of everything stated in the leaflet." With minor exception, the Board and the court of appeals agreed with the administrative law judge. The Supreme Court reversed those decisions.

While noting that a suit filed against hourly wage employees who "lack the backing of a union," may provide a need for the NLRB to intervene and provide a remedy, the Supreme Court also noted that there are "weighty countervailing considerations," as access to the courts is a First Amendment aspect of the right to petition the Government for redress of grievances. With respect to the libel allegations, the Court noting that an employer can recover damages in a tort action arising out a labor dispute if it can prove malice and actual injury, stated that to allow the Board to enjoin the prosecution of a well-grounded state lawsuit, would mean that a State court plaintiff would be deprived of a remedy for actual injury, since the "Board can award no damages, impose no penalty, or give any other relief"

to the plaintiff. The Court held that "it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by Section 7 of the NLRA. As the Court stated at 748:

> To summarize, we hold that the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit, lacks a reasonable basis in fact or law. Retaliatory motive and lack of reasonable basis are both essential prerequisites to the issuance of a cease-and-desist order against a state suit. The Board's reasonable basis inquiry must be structured in a manner that will preserve the state plaintiff's right to have a state court jury or judge resolve genuine material factual or state-law legal disputes pertaining to the lawsuit. Therefore, if the Board is called upon to determine whether a suit is unlawful prior to the time that the state court renders final judgment, and if the state plaintiff can show that such genuine material factual or legal issues exist, the Board must await the results of the state-court adjudication with respects to the merits for the state suit. If the state proceedings result in a judgment adverse to the plaintiff, the Board may then consider the matter further and, if it is found that the lawsuit was filed with retaliatory intent, the Board may find a violation and order appropriate relief. In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis.

Notwithstanding the above, the Supreme Court at footnote 5, made what it described as an exception to the above described rule. And it is footnote 5, which is what the General Counsel relies on to support his theory of this case. The Court stated at 737–738:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. Brief of Petitioner 12–13 ,20; Reply Brief for Petitioner 8. Nor could it be successfully argued otherwise for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637, enforcement denied, 446 F.2d 369, revd. 409 U.S. 213; *Booster Lodge No. 405* 185 NLRB 380, 385, enforced 459 F.2d 1143, affd. 412 U.S. 84, , and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB v Nash-Finch Co*., 404 U.S. 138, 144.[4]

With respect to footnote 5, the Court did not give much guidance as to the types of cases that would fall within this exception except for the cited cases which involved situations where a union went to court to enforce fines against members under circumstances where the fines themselves might have violated Section 8(b)(1)(A) of the Act.[5] I think it fair to assume, however, that the Court did not intend the exceptions to swallow up the general rule.

Since the Supreme Court's opinion, there have been a number of cases dealing with issues arising out of *Bill Johnson's* situations. Generalizing, it seems that the cases have fallen into four categories.

There have been cases involving lawsuits where the holdings were based on the general test of *Bill Johnson's* which requires that the lawsuit be baseless and motivated by retaliatory intent. *Diamond Walnut Growers v. NLRB*, 53 F.2d 1087 (9th Cir. 1995) (specious libel suit against a striking union); *Phoenix Newspapers,* 294 NLRB 47, 48–50 (1989) (a suit against a union alleging libel and tortious interference with business relationships that was dismissed by the State court); *Machinists Lodge 91 (United Technologies*), 298 NLRB 325, 326 (1990), enfd, 934 F.2d 1288 (2d Cir. 1991) (dismissed lawsuit by union seeking to enjoin a member from attending union meetings and engaging in certain conduct at the union hall); *NLRB v. Operating Engineers Local 520,* 15 F.3d 677 (7th Cir. 1994) (though libel suit found to be without merit, court, as opposed to the Board, held evidence was not enough to show that lawsuit motivated by retaliatory reasons); *Johns & Hardin v. NLRB,* 49 F.3d 237 (6th Cir. 1995) (court held employer who filed criminal trespass complaints against union organizers who distributed union literature on driveway of property didn't violate the Act under *Bill Johnson's* even though it violated the Act by preventing organizers from engaging in handbilling activity); and *Summitville Tiles, Inc*., 300 NLRB 64, 66 (1990) (evidence of the employer's antiunion animus supported the conclusion that a lawsuit was intended to retaliate).

There is another category of cases where an employer, by means of a lawsuit, has directly sought to prevent employees from having access to the Board's processes. In such cases, it is typically alleged that a person or persons have maliciously filed charges with the NLRB or have furnished false statements or affidavits to the agency. Such lawsuits are almost always without merit and should be preempted by the Supremacy clause of the Constitution. While such suits would typically be baseless and motivated by retaliatory considerations, their mere filing would reasonably be expected to have a chilling affect on the right of people to have access to the Board's processes.[6] In

[4] In *NLRB v Nash-Finch*, supra, the Supreme Court held that the NLRB has implied authority to obtain a Federal court injunction to enjoin enforcement of a state court injunction regulating peaceful picketing by a union on preemption grounds.

[5] *NLRB v. Textile Workers Local 1029*, 409 U.S. 213 (1972), involved a case where the union violated Sec. 8(b)(1)(A) when it fined employees who resigned from the union during a strike and returned to work. *Booster Lodge 405,* 412 U.S. 84 (1973*)*, also involved the question of union fines and Sec. 8(b)(1)(A).

[6] Consider the time, expense and anxiety of defending even a frivolous lawsuit that is ultimately dismissed by a judge before a trial. One must file an answer; file and respond to pretrial motions; answer inter-

other words, such a lawsuit is a direct attempt to prevent the Board from carrying out its statutory mandate and can be viewed as an attempt by a private party to nullify the Board's jurisdiction insofar as it affects that party. See for example *LP Enterprises,* 314 NLRB 580 (1994), and *Manno Electric,* 321 NLRB 278 (1996).

Another category of cases which do fit within the footnote 5 exception, involve cases where the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act. As noted above, the cases cited by the Supreme Court in footnote 5, involved situations where a union was alleged to have violated Section 8(b)(1)(A) of the Act by fining employee/members and the lawsuits were simply the mechanism to enforce and collect the fines. Along equivalent lines are cases where a union is charged with violating Section 8(b)(4) and 8(e) of the Act when it seeks to enforce a contract provision that is itself illegal under the hot cargo provisions of Section 8(e) of the Act. In such cases, as the underlying contract is either facially illegal or would be illegal as enforced, a lawsuit or grievance seeking to enforce such an illegal contract provision would itself be illegal under the footnote 5 exception of *Bill Johnson's*. In *Elevator Constructors (Long Elevator*), 289 NLRB 1095, (1988), the Board held that a Union violated Section 8(b)(4)(ii)(A) by filing a grievance that was predicated on a reading of the collective-bargaining agreement that, if successful, would have resulted in a de facto hot cargo clause. That is, had the grievance been successful and had it been enforced by a court, the Order issued would have been one that was a violation of Section 8(e). The Board stated:

> Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

Finally, there are cases involving an attempt by an employer, via a lawsuit, to prohibit peaceful picketing or solicitation. The three cases discussing this type of situation are *Loehmann's Plaza*, 305 NLRB 663, (1991), *Riesbeck Food Markets*, 315 NLRB 940, (1994) enfd. denied 91 F.3d 132 (4th Cir. 1996), and *Be-Lo Stores*, 318 NLRB 1, 12 (1995), enfd. denied 126 F.3d 268 (4th Cir. 1997).

In *Loehmann's Plaza*, the Board dealt with two related issues. The first was whether the Respondent's demands that union representatives cease engaging in area standards picketing and handbilling on private property in front of entrances of the target employer at a shopping mall, was a violation of Section 8(a)(1). In finding a violation, the Board applied the balancing test of *Jean Country*, 291 NLRB 11 (1988), and concluded that although the area standards picketing and handbilling was not at the strong end of Section 7 rights, it was worthy of accommodation. In that case, the Board found that the Union's alternative means of communicating its message was not reasonable.

The second issue in *Loehmann's Plaza*, was whether the Respondent violated Section 8(a)(1) by filing a state court lawsuit seeking injunctive relief. The General Counsel contended that the filing of the lawsuit was an unfair labor practice because under footnote 5 of *Bill Johnson's,* the lawsuit was a preempted case and therefore excluded from the general principles of *Bill Johnson's*. After discussing the Supreme Court's decisions in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), and *Longshoremen ILA v. Davis*, 476 U.S. 380 (1986) (both dealing with the issue of preemption and peaceful picketing), the Board concluded that unless and until the NLRB's General Counsel issues a complaint alleging as an unfair labor practice, the filing of a lawsuit seeking a remedy against peaceful picketing, that lawsuit cannot be considered to be preempted within the meaning of footnote 5 and therefore the complaint should be dismissed unless the General Counsel can show that the lawsuit was baseless *and* motivated by retaliatory reasons. (That is, the complaint must be evaluated under the general *Bill Johnson's* standards and not the fn. 5 exceptions.) On the other hand, the Board also concluded that once the General Counsel issues a complaint alleging that the lawsuit is an unfair labor practice, the Respondent will violate the Act by continuing to prosecute the lawsuit, because it is now on notice that the subject matter of the lawsuit is preempted. The Board stated:

> A different analysis is warranted with respect to the Respondent's postcomplaint pursuit of the state court lawsuit. The Respondent's prosecution of the suit during that time period need not be evaluated under *Bill Johnson's* because the suit was preempted and thus fell within the footnote 5 exception to the Court's decision. For the reasons stated below, we find that there is a sound basis for applying a different rule to a preempted lawsuit alleged to violate Section 8(a)(1) of the Act.
>
> As this case illustrates, prior to preemption of state court jurisdiction under *Garmon* over conduct arguably subject to the Act, a respondent pursuing its state court action seeking to enjoin trespassory union picketing has a right to protect, or at least have adjudicated, its property rights. However, once the General Counsel decides to initiate a formal adjudictatory proceeding, the Board's jurisdiction is invoked and it becomes the exclusive forum for an adjudication of a respondent's property rights. Because at that point the state court tribunal "has no power to adjudicate the [preempted] subject matter," any attempt to continue the litigation necessarily amounts to pure harassment, i.e., an effort to subject the defendant or defendants in the lawsuit to litigation costs and burdens before a tri-

rogatories; produce documents; and give testimony under oath in pretrial depositions. When one considers the scope of the pretrial questions that may be posed in a civil suit, one can see that being a defendant in a civil action is no small matter.

> bunal that indisputably lacks jurisdiction over the matter at that time. [Footnotes omitted.][7] [305 NLRB at 670–671.]

In *Riesbeck Food Markets*, supra, the Board dealt with a situation very similar to that in *Loehmann's Plaza* and which involved, inter alia, allegations that the Respondent violated Section 8(a)(1) by (1) denying access to private property by union pickets and handbillers and (2) prosecuting a state lawsuit seeking to limit peaceful picketing and handbilling activity to public property. In that case, a Board majority concluded that where a lawsuit involves a matter which is preempted, the Respondent "has an affirmative duty to take action to stay the state court proceedings following issuance of the Board complaint."

In *Be-Lo Stores*, 318 NLRB 1, 12, the Board found, among other things, that the Respondent violated the Act by denying union nonemployee picketers access to private property in order to engage in solicitation and also violated the Act by maintaining its state trespass lawsuit after the General Counsel issued a complaint alleging that the denial of access was unlawful. Citing *Loehmann's Plaza*, the Board found that the continuation of the lawsuit, after the complaint was issued. violated Section 8(a)(1) and ordered the Respondent to reimburse the Union for litigation expenses incurred in the state court proceeding. On appeal, the court refused to enforce this aspect of the Board's Order. *Be-Lo Stores v. NLRB*, 126 F.3d 268. In this regard, the court held that the Respondent did not violate Section 8(a)(1) by denying access for solicitation and picketing and therefore the lawsuit seeking an injunction could not violate the Act.

It seems to me that the issues in the present case are similar to those in *Loehmann's Plaza*, *Riesbeck Food Markets,* and *Be-Lo Stores*, and that the outcome of this case should be determined by the standard used in those cases. That being the case, I conclude that the complaint must be dismissed.

In order to fit within the exception of footnote 5 of *Bill Johnson's*, the motion to amend the previous court orders has to have involved a matter which is either preempted or which if granted would commit the court to countenance and underlying act by the Respondent which would be a violation of some federal law. Under *Loehmann's Plaza*, the only rationale for finding that the present case would fall within the footnote 5 exception would be because the subject matter of the lawsuit was preempted. And indeed it was, as so found by Judge Diana.

Nevertheless, at the time that the unfair labor practice charge was filed, the Respondent had not been officially notified by any responsible official of the NLRB that its lawsuit was considered to be preempted. Under *Loehmann's Plaza* and subsequent cases, such notification could only come about upon the issuance of a complaint which, in this case, occurred on June 25, 1997. And 2 days later, Judge Diana dismissed the motion to amend and terminated the lawsuit entirely. Given the 2-day interval between the issuance of the complaint and the dismissal of the State court lawsuit, the Respondent hardly had time or opportunity to continue to process its state court action or to withdraw it. As there is no evidence in this case to indicate that the Respondent has filed an appeal of Judge Diana's ruling or has sought to have the Judge reconsider his decision, the complaint in the instant matter must be dismissed under the holding of *Loehmann's Plaza*.

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the compliant.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The complaint is dismissed.

---

[7] The Board's decision in *Loehmann's Plaza* presents to me what seems to be an anomaly. For if one were to apply the rule literally, it means that there can be no unfair labor practice based solely on the filing of a lawsuit seeking a remedy for a union's peaceful picketing, unless and until the General Counsel issues a complaint alleging that the lawsuit is a violation of the Act. This is because it is only after the issuance of the unfair labor practice complaint that the Respondent would be put on official notice that the subject matter of the state lawsuit is preempted. This means, in effect, that if a complaint is issued which alleges the filing of a lawsuit to be an unfair labor practice, the Board may not find a violation of law *except only as to conduct which occurs after the complaint is issued*. That is, if the Respondent, after issuance of the complaint, takes no further steps to process the lawsuit and/or fails to withdraw the lawsuit, the initial complaint must be dismissed. Perhaps a better solution to this conundrum would be for the General Counsel, or the Regional Director on his or her behalf, upon application of the defendant in such a lawsuit, to issue a formal letter notifying the parties that the subject matter of the lawsuit is preempted. And if the lawsuit is then pressed further, the Regional Director could issue a complaint and notice of hearing after the filing of an appropriate charge.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes